writing off of bad debts and the making of provision for doubtful debts and satisfied themselves that all known bad debts had been written off and that adequate provisions had been made for doubtful debts'? The court was told that the directors had travelled to Indonesia to try to recover the debts; telephone calls were also made. Letters of demand were also sent. Surely they must know the status of the debts. Why weren't provisions made? Eventually, when they could not hide any longer following the filing of this petition, more than $2m bad debts had to be written off, leading to the result that the company made a loss of $2.4m in 1989, almost wiping out all the accumulated profits.

I was satisfied that the petitioners had established their case under s 216(1)(a) on two grounds, namely, non-payment of dividends and refusal of petitioners' request for representation on the board, and were entitled to reliefs. As regards the way in which the respondents managed the bad debts of the company, while that may indicate a lack of competence or judgment, I entertain some reservations whether that conduct comes within the scope of s 216(1). Since the petitioners had shown that they were entitled to reliefs on other grounds, I do not propose to further examine this point.

I was inclined to give the respondents the option of purchasing the shares of the petitioners at a price to be determined by the auditors based on the accounts; and if the respondents should fail to exercise the option within a reasonable time, I would then order the company be wound up. I did not think it was practical, having regard to the fact that the parties were at loggerheads and mutual trust and confidence were no longer there, to order that the company should continue with proper representation on the board for the petitioners. This would only cause further deadlocks. However, on my indication to the parties at the conclusion of the hearing that the petitioners had made out a case for reliefs, the respondents' counsel, after consulting the respondents who were present in court, told this court that the respondents would not be able to purchase the shares and that in the circumstances, the company be wound up. I accordingly ordered that the company be wound up.

Finally, I ought to refer very briefly in passing to a technical point raised by the respondents' counsel. As pleaded in para 1.1 of the petition, it was alleged that the respondents, the directors and majority shareholders of the company 'have conducted the affairs of the company' and 'have exercised their powers as directors ...'. However, under s 216(1)(a), the petitioners must show that 'the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive ...'. I accepted the submission of counsel for the petitioners that this was really a matter of semantics. The respondents knew precisely what they had to meet. I was satisfied that the affairs of the company were being conducted and the powers of the directors were being exercised in a manner oppressive to the petitioners and in disregard to their interest. If I had thought it really necessary I would have granted leave to amend the petition.

Application allowed.

Solicitors: *Allen & Gledhill; YH Cheong; Boey Ng & Wan.*

Reported by *Terence Tan Bian Chye*

Yeo Hiap Seng v Australian Food Corp Pte Ltd & Anor

HIGH COURT (SINGAPORE) — SUIT NO 844 OF 1990
GOH PHAI CHENG JC
23 FEBRUARY 1991

Civil Procedure — 'Without prejudice' negotiations — Application to expunge parts of affidavit relating to 'without prejudice' negotiations between plaintiffs and first defendants — Whether expunged parts should apply to proceedings against second defendant as well — Second defendant took no part in the 'without prejudice' negotiations

Civil Procedure — Appearance — Failure to enter appearance — No notice of change of registered address with Registry of Companies — Service of writ at last registered address on record

Civil Procedure — Summary judgment — Application for on proceeds of a dishonoured cheque — Defendant not allowed to set up by way of a set-off a counterclaim for damages for breach of the underlying contract — Counterclaim a separate action and not a tribale issue for setting aside default judgment — Plaintiffs entitled to judgment without stay of execution

Negotiable Instruments — Cheques — Effects of drawing a cheque — Whether cheque should be honoured in absence of a total failure of consideration — Bills of Exchange Act (Cap 23, 1985 Ed), ss 27 & 55

Sale of Goods — Acceptance of goods — When buyer is deemed to have accepted goods from the seller — Sale of Goods Act 1979 [UK], s 35(1)

The plaintiffs were manufacturers of fruit juices, soft drinks and other beverages and the first defendants were customers of the plaintiffs. The second defendant was a director of the first defendants.

In July 1989, a contract was entered into between the plaintiffs and the first defendants for the plaintiffs to produce and supply a kiwi fruit drink in cans to the first defendants' customer in Taiwan. The contract provided that the plaintiffs would produce the fruit juice from kiwi fruit juice concentrate supplied by the first defendants in accordance with certain agreed procedures and the specifications supplied by the first defendants.

The first defendants had paid the plaintiffs an initial part payment and for the balance of moneys due and owing, issued

a DBS cheque for the sum of $54,500 in favour of the plaintiffs. The plaintiffs produced 10,500 cartons of fruit juice drinks and supplied the same to the first defendants' customer in Taiwan on 29 July 1989. Upon presentation of the cheque at the DBS Bank, the cheque was dishonoured and the plaintiffs were requested by the bank to 'refer to drawer'. The plaintiffs therefore claimed against the first defendants for the proceeds of the cheque.

The plaintiffs' claim against the second defendant was based on a contract of guarantee dated 17 July 1989 made between the plaintiffs and the second defendant pursuant to which the second defendant guaranteed that the DBS cheque issued by the first defendants would be honoured.

On 4 January 1991, the assistant registrar dismissed an application by the first defendants to set aside a judgment entered against them in default of appearance with costs. On 10 January 1991, the assistant registrar ordered that: (i) the second defendant's application for a part of an affidavit filed in support of the plaintiffs' application for summary judgment against the second defendant to be expunged from the records in the proceedings be dismissed; (ii) part of the said affidavit be expunged in so far as proceedings against the first defendants were concerned; and (iii) the second defendant pay the plaintiffs' costs fixed at $600.

It was against these two decisions of the assistant registrar that the present appeals were brought. A third appeal was also brought against a decision of the assistant registrar who granted summary judgment on 1 October 1990 against the second defendant for the sum of $54,500 to the plaintiffs with interest and costs.

Counsel for both defendants contended that the expunged parts of the affidavit should apply to proceedings against both defendants and be expunged with respect to the plaintiffs' case against the second defendant as well, on the ground that, as long as there is an order to expunge certain parts of the said affidavit, those expunged parts cannot be used against any party to the proceedings.

As regards their appeal against the decision to dismiss their earlier application to set aside the judgment entered against them in default of appearance, the first defendants claimed that there was a triable issue in this case in that, first, there was a total failure of consideration for the cheque issued by them in favour of the plaintiffs (in that they had written to the plaintiffs to complain about a few leaking cans delivered by the plaintiffs to the first defendants' customer in Taiwan), and secondly, they had a counterclaim against the plaintiffs for at least $196,244.84 (based on their allegation that the goods sold and delivered by the plaintiffs to the first defendants' customer in Taiwan were unmerchantable and not fit for the purpose). The plaintiffs refuted these allegations.

Held, dismissing all the appeals and awarding the plaintiffs costs of the first and third appeals:

(1) The second defendant could only succeed in her application if she could show that she was entitled to claim the privilege. As the second defendant took no part in the 'without prejudice' negotiations either personally or through an agent, she could not claim the privilege.

(2) The first defendants did not have a reasonable explanation for not entering an appearance; inspite of several reminders, they had failed to file notice of change of registered address with the Registry of Companies and hence service of the plaintiffs' writ of summons on the first defendants at their last registered office on record was good.

(3) For the purpose of setting aside a default judgment, the first defendants need only have disclosed an arguable or triable issue which they have failed to do as:

(i) they had not rejected the goods within a reasonable time and was thus, pursuant to s 35(1) of the Sale of Goods Act 1979, deemed to have accepted the goods;

(ii) the counterclaim raised by them did not relate to the plaintiffs' claim but was a separate action altogether and therefore the facts alleged by the first defendants were wholly irrelevant to the issue before the court. Even if the first defendants could succeed in their counterclaim, in an application for summary judgment against a defendant on the proceeds of a dishonoured cheque, the defendant will not be allowed to set up by way of a set-off a counterclaim for damages for breach of the underlying contract and the plaintiffs ware entitled to judgment for the amount of their claim without a stay of execution. A cross-claim relating to the transaction in which the action on a bill of exchange arose is not a defence to the action on the bill of exchange.

(4) Under the terms of the contract of 17 July 1989 between the plaintiffs and the second defendant, the second defendant promised that she would pay the plaintiffs the sum of $54,500 if the cheque issued by the first defendants was not honoured. As there was no rejection of the goods by the first defendants prior to the dishonour of the cheque, the second defendant must honour the promise she gave under the contract of 17 July 1989.

Cases referred to

1 *Rush & Tompkins Ltd* v *Greater London Council & Anor* [1988] 3 All ER 737 (distd)
2 *A-B Chew Investments Pte Ltd* v *Lim Tjoen Kong* [1989] 3 MLJ 328 (follod)
3 *Marina Sports Ltd* v *Alliance Richfield Pte Ltd* [1990] 3 MLJ 5 (follod)
4 *Plunkett & Anor* v *Barclays Bank Ltd* [1936] 2 KB 107 (follod)
5 *Flach* v *London and South Western Bank* (1915) 31 TLR 334 (follod)
6 *Fielding & Platt Ltd* v *Najjar* [1969] 2 All ER 150 (follod)
7 *Montecchi* v *Shimco* [1979] 1 WLR 1180 (follod)
8 *Montebianco Industrie Tessili SPA* v *Carlyle Mills (London) Ltd* [1981] 1 Lloyd's Rep 509, CA (follod)

Legislation referred to

Bills of Exchange Act (Cap 23, 1985 Ed) ss 27, 55
Sale of Goods Act 1979 [UK] s 35(1)

Andre Yeap for the plaintiffs.
Ang Kim Leong for the defendants.

Cur Adv Vult

Goh Phai Cheng JC: There are three appeals in this suit. The first appeal is against a decision given by the learned assistant registrar on 4 January 1991 dismissing an application made by the first defendants to set aside a judgment entered against the first defendants in default of appearance with costs fixed at $800.

The second appeal is against a decision given by the assistant registrar on 10 January 1991 ordering that:

(a) the second defendant's application that para 25 to 30 of the affidavit of James Loke filed on 6 Septem-

ber 1990 and the exhibit referred thereto as 'JL-4' filed in support of the application for summary judgment against the second defendant herein be expunged from the records in these proceedings be dismissed;

(b) paragraphs 25 to 30 of the said affidavit of James Loke filed on 6 September 1990 be expunged in so far as proceedings against the first defendants are concerned and the said affidavit shall be so endorsed on the first page thereof and paras 25 to 30 thereof and exh 'JL-4' thereto be sidelined in red; and

(c) the second defendant do pay the plaintiffs' costs fixed at $600 forthwith.

The third appeal is against a decision of the learned assistant registrar who granted summary judgment on 1 October 1990 against the second defendant for the sum of $54,500 to the plaintiffs with interest and costs.

The plaintiffs are manufacturers of fruit juices, soft drinks and other beverages and the first defendants are customers of the plaintiffs. The second defendant is a director of the first defendants. The plaintiffs' claim against the first defendants is for the proceeds of a cheque no 390463 post-dated 20 August 1989 for the sum of $54,500 drawn by the first defendants on the Rochor Road Branch of the DBS Bank of Singapore, which was dishonoured on presentation for payment. The plaintiffs were requested by the bank to 'refer to drawer'.

The plaintiffs' claim against the second defendants is based on a contract dated 17 July 1989 made between the plaintiffs and the second defendant which reads:

> Date: 17 July 1989
>
> To: Yeo Hiap Seng
> 950, Dunearn Road
> Singapore 2366
>
> Attn: Mr CT Yeow
>
> Dear Sir
>
> I, Amy Tan Meng Choo of I/C No 0978214A of 18, Chu Lin Road Singapore 2366, and a director of Australian Corpn Pte Ltd, a company registered in the Republic of Singapore hereby guarantee that the DBS Cheque No 390463 for the sum of S$54,500 issued in favour of Yeo Hiap Seng Ltd will be honoured.
>
> Yours faithfully,
> Signed:
> Amy Tan Meng Choo
> Chairman.

The above 'guarantee' was given by the second defendant on the letter-head of Australian Food Corpn Pte Ltd.

Sometime in July 1989, a contract was entered into between the plaintiffs and the first defendants for the plaintiffs to produce and supply a kiwi fruit juice drink in cans to the first defendants' customer in Taiwan. The said contract provided, inter alia, that the plaintiffs would produce the fruit juice from kiwi fruit juice concentrate supplied by the first defendants in accordance with certain agreed procedures and the specifications supplied by the first defendants. The kiwi fruit juice concentrate was produced by Tuara Foods Co-operative Ltd in New Zealand and shipped to the plaintiffs in Singapore on the instructions of the first defendants. A total of 10,500 cartons were produced by the plaintiffs and shipped in five container loads to the first defendants' customer in Taiwan. Each carton contained 24 cans of fruit juice drink produced by the plaintiffs. The plaintiffs had produced more than 10,500 cartons of the fruit juice drink and the excess were held in their possession pending the placement of further orders from the first defendants. The first defendants had paid the plaintiffs an initial part-payment of US$42,000, the equivalent of S$81,738.84.

The said DBS cheque for the sum of $54,500 was issued by the first defendants to the plaintiffs for the balance of moneys due and owing by the first defendants to the plaintiffs for the 10,500 cartons of fruit juice drinks produced and supplied to the first defendants' customer in Taiwan. The 10,500 cartons of canned kiwi fruit juice were shipped to and received by the first defendants' customer in Taiwan on 29 July 1989.

The abovementioned facts are not in dispute. At the commencement of the hearing, counsel for both defendants urged this court to deal first with the second appeal, namely, the appeal relating to the application to expunge certain parts of the affidavit of James Loke filed on 6 September 1990 and the exhibit therein referred thereto as 'JL-4', as he was of the view that the outcome of the other two appeals will depend on the outcome of this appeal. I heard this appeal on 6 February 1991 and it was adjourned to 8 February 1991 when I dismissed the appeal with costs fixed at $1,000 to be paid to the plaintiffs by both defendants. I now give my reasons.

The parts of the said James Loke's affidavit, which the defendants have taken objection to, relate to 'without prejudice' negotiations between the parties with the view to reaching an amicable settlement regarding the first defendants' complaint about the kiwi fruit juice supplied to the first defendants' customer in Taiwan. The second defendant did not take part in nor was she represented at the negotiations.

With respect to that part of the said order of the assistant registrar of 10 January 1991 expunging parts of James Loke's affidavit filed on 6 September 1990 in so far as proceedings against the first defendants are concerned, the defendants contend that those expunged

parts should apply to proceedings against both defendants. With respect to the remaining part of that order dismissing the second defendant's application to expunge parts of the said affidavit of James Loke, the defendants are asking for the relevant parts of the said affidavit of James Loke to be expunged with respect to the plaintiffs' case against the second defendant.

The defendants' counsel submitted that the learned assistant registrar took the view that the second defendant cannot claim that the negotiations were privileged because she was neither present nor represented at the negotiations. Counsel for the defendants contended that since the two defendants are parties to the same proceedings, as long as there is an order to expunge certain parts of the said affidavit of James Loke, those expunged parts cannot be used against any party to the proceedings, including the second defendant. In support of his contention, the defendants' counsel cited the following passage from *Phipson on Evidence* (14th Ed) at p 555 paras 20-67 which reads:

> Now that it is clear that the protection given by the rule relating to without prejudice correspondence is a species of privilege, it is no surprise that the maxim 'once privileged, always privileged' applies in this class of case also. That being so, such correspondence remains privileged even after a settlement has been reached (except on the question of whether or not a final settlement has been concluded). It is inadmissible in any subsequent litigation concerned with the same subject-matter. That is so whether the litigation is between the same or different parties.

Counsel for both defendants also referred this court to the case of *Rush & Tompkins Ltd* v *Greater London Council & Anor*[1] in support of his contention. In that case the House of Lords held that without prejudice correspondence entered into with the object of effecting the compromise of an action remained privileged after the compromise had been reached and accordingly the correspondence was inadmissible in any subsequent litigation connected with the same subject matter whether between the same or different parties and, furthermore, was also protected from subsequent discovery by other parties to the same litigation. It followed that the second defendants were not entitled to discovery of the without prejudice correspondence which had passed between the plaintiffs and the first defendants leading up to the settlement of their action.

In my view, the rule of law in *Rush & Tompkin*'s case[1] is good law. However, the facts of that case can be distinguished from the instant case. In *Rush & Tompkin*'s case,[1] the issue before the House of Lords was whether the second defendants could have access to material which was privileged between the plaintiffs and the first defendants in that case. The plaintiffs had compromised their position vis-a-vis the first defendants. The second defendant in that case was trying to use the without prejudice correspondence which had passed between the plaintiffs and the first defendants in that case and that would be disastrous for the plaintiffs. To encourage a settlement between parties there was no other decision the House of Lords could have reached. The issue in the instant case is whether the second defendant who was never at or represented in the negotiations can now claim that certain exhibits in the affidavit of James Loke filed on 6 September 1990 are privileged from disclosure. In our instant case there are two applications — one by the first defendants and the other by the second defendant. In my view, the second defendant can only succeed if she can show that she is entitled to claim the privilege.

In the case of *A-B Chew Investments Pte Ltd* v *Lim Tjoen Kong*,[2] Coomaraswamy J held that the privilege on 'without prejudice' negotiations applies to statements by the parties and the solicitors respectively acting for them. If a party took no part in the 'without prejudice' negotiations either personally or through an agent, he cannot claim the privilege. Accordingly, I am of the view that the second defendant's appeal against the decision of the learned assistant registrar of 10 January 1991 cannot succeed.

Where the first defendants are concerned, the defendants' counsel relied on the maxim 'once privileged, always privileged'. However, I am of the view that on the basis of the principle laid down in the case of *A-B Chew Investment Pte Ltd*,[2] what is privileged between A and B is privileged between them only to that extent and for purposes of proceedings between A and B only. The fact that there are 'without prejudice' negotiations between A and B does not mean that B would be in a position to say that the information cannot be used against C. Accordingly, I also dismissed the appeal of the first defendants against the order of the learned assistant registrar given on 10 January 1991.

Next, I shall deal with the appeal against the learned assistant registrar's decision in dismissing the first defendants' application to set aside the judgment entered against them in default of appearance. There are two issues arising from this application, namely;

(a) whether the first defendants have a good reason for not entering an appearance; and
(b) whether the first defendants have disclosed a defence on the merits.

The writ of summons was duly served on the first defendants at their registered office at 150 Orchard Road #07-10/11, Orchard Plaza, Singapore 0923 on 22 May 1990. The first defendants failed to enter a memorandum of appearance within eight days thereof or at all. On 6 June 1990, the plaintiffs obtained judgment in default against the first defendants for the sum of $54,500 together with interest and costs.

In the affidavit of Tan Meng Choo filed on behalf of the first defendants on 4 September 1990, the first defendants admitted that, as at the date of service of the writ, their registered office was in fact at #07-10/11 Orchard Plaza. However, the first defendants alleged that they were unaware of the said service because the recipient of the writ at #07-10/11 Orchard Plaza failed to inform the first defendants of the same. The recipients were the first defendants' former company secretary/auditor and their registered office was used as the registered office of the first defendants. Sometime in 1989 there was a change of secretary/auditor and the registered office of the first defendants was shifted to the office of Messrs Lee Chee Wung & Co at 50 Jalan Sultan, #10-05, Jalan Sultan Centre, Singapore 0719. The new secretary/auditor was instructed to lodge the necessary forms with the Registrar of Companies to notify the said change of the first defendants' registered office. However, this was not done.

Mr Lee Swee Seng, the director and secretary of Laren Management Services Pte Ltd ('Laren Management'), the former company secretary of the first defendants, filed an affidavit on 25 September 1990 stating that upon receipt of the writ, Laren Management promptly forwarded the same to Mdm Tan Meng Choo, the director of the first defendants, at No 18 Chu Lin Road, Singapore. This was not denied by the first defendants. In the affidavit of Tan Meng Choo filed on behalf of the first defendants on 23 October 1990, the said Tan Meng Choo alleged that she moved out of 18 Chu Lin Road in 1986.

Counsel for the first defendants also referred this court to the affidavit of Ng Kok Peng filed on behalf of the plaintiffs on 26 October 1990 which exhibited a copy of the certificate of title of No 18 Chu Lin Road. That certificate shows a purported transfer of the property by Tan Meng Choo to one Asha Kurup on 11 October 1986 and counsel therefore submitted that Tan Meng Choo could not have received the writ posted to her at No 18 Chu Lin Road in 1990.

The said affidavit of Ng Kok Peng also shows the results of a search made at the Registry of Companies for information relating to the first defendants. It showed Tan Meng Choo as a director of the first defendants and that Tan Meng Choo's residential address in the records of the said registry on 3 October 1989 was No 18 Chu Lin Road. In my view, this search shows that Tan Meng Choo had neglected or refused to notify the Registry of Companies of her change of residential address. Furthermore, the contract executed between the plaintiffs and Tan Meng Choo on 17 July 1989 also states that Tan Meng Choo (who was then chairman of the first defendants) was residing at 18 Chu Lin Road. She therefore made a misrepresentation to the plaintiffs as to her place of residence. Accordingly, I am not satisfied that the first defendants have a reasonable explanation for not entering an appearance.

In reaching the above conclusion, I have also taken into consideration the following paragraphs of the affidavit of Lee Swee Leng filed on behalf of Laren Management on 25 September 1990 which read:

> 3 Notwithstanding the first defendants' termination of the services of Laren Management, the first defendants failed, refused and/or neglected to file a notice of change of address with the Registry of Companies (hereinafter referred to as 'the ROC'). On 28 July 1989 and 2 August 1989, Laren Management informed the first defendants of their obligation to file the said notice with the ROC. Annexed hereto and marked collectively as 'LSS-1' are copies of the following:
>
> (a) the telefax dated 28 July 1989 from Laren Management to the first defendants; and
> (b) the telefax dated 2 August 1989 from Laren Management to M/s Eric Management Services Pte Ltd, the company secretary to the first defendants at that time.
>
> 4 However, inspite of the aforesaid reminders, the first defendants failed to file the said notice of change of registered address with the ROC. Accordingly, the registered office of the first defendants continued to be listed as the registered office of Laren Management.
>
> 5 On 22 May 1990, a copy of the writ of summons in the action herein was served by the process server of the solicitors for the plaintiffs on the first defendants at the registered office of Laren Management. Upon receipt of the said writ, Laren Management promptly forwarded the same to the second defendant who is a director of the first defendants. The address to which the said writ was forwarded is the address of the second defendant as stated in her identity card at the time the first defendants engaged the services of Laren Management, namely, No 18 Chu Lin Road.
>
> 6 Since 23 May 1989, in addition to the writ issued by the plaintiffs herein, several writs of summons and letters of demand issued by various parties against the first defendants have been served on the registered office of Laren Management. Upon receipt of the said writs and letters, Laren Management has always promptly forwarded the same to the second defendant, although Laren Management is under no legal obligation to do so. Annexed hereto and marked 'LSS-2' is a copy of one of the said letters of demand served on the registered office of Laren Management.

The above allegations of Lee Swee Leng have not been disputed by the first defendants.

I shall now deal with the issue whether the first defendants have disclosed a good defence on the merits. For the purpose of setting aside a default judgment, the first defendants need only to disclose an arguable or triable issue: see *The Supreme Court Practice 1990*, O 13 r 9, para 13/9/5. The first defendants' counsel submitted that there is a triable issue in this case in that, firstly,

there is a total failure of consideration for the cheque issued by the first defendants in favour of the plaintiffs and secondly, the first defendants have a counterclaim of at least $196,244.84 against the plaintiffs. The first defendants alleged that the goods sold and delivered by the plaintiffs to the first defendants' customer in Taiwan are unmerchantable and not fit for the purpose.

Counsel for the first defendants referred this court to the facts alleged in the affidavit of Tan Meng Choo filed on behalf of the first defendants on 30 August 1990. These allegations have been disputed by the plaintiffs.

Counsel for the first defendants also referred this court to exh 'JL-3' to the affidavit of James Loke filed on behalf of the plaintiffs on 6 September 1990, which is a letter sent by the plaintiffs to the first defendants on 29 August 1989. That letter shows that the defendants had made a complaint about a few leaking cans to the plaintiffs on 26 August 1989.

The facts which are not in dispute are the following:

(a) 10,500 cartons of the canned fruit juice drink were shipped to and received by the first defendants' customer in Taiwan on 29 July 1989;
(b) a complaint was made by Tan Meng Choo to one CT Yeow of the plaintiffs regarding a few leaking cans on 26 August 1989;
(c) the DBS cheque no 390463 was dishonoured when it was presented to the bank for payment on 20 August 1989.

On these undisputed facts and the fact that the plaintiffs' claim against the first defendants is based on the DBS cheque no 390463 issued by the first defendants in favour of the plaintiffs, this court is satisfied that the first defendants have no defence to the claim or there is no issue or question in dispute which ought to be tried. The basic principles are clear. Section 55 of the Bills of Exchange Act (Cap 23, 1985 Ed) stipulates in effect that the drawer of a cheque, by drawing it, engages that upon due presentation it will be paid, and if it is dishonoured, he will compensate the holder: see *Marina Sports Ltd* v *Alliance Richfield Pte Ltd.*[3] The cheque in the instant case was dishonoured by the bank and the payee was told by the bank to 'refer to drawer'. The words 'refer to drawer' is in effect a statement by the banker that 'we are not paying; go back to the drawer and ask why', or else 'go back to the drawer and ask him to pay': *Plunkett & Anor* v *Barclays Bank Ltd*[4] at p 120, adopting the language of Scrutton J (as he then was) in *Flach* v *London and South Western Bank Ltd*[5] at p 336.

In *Fielding & Platt Ltd* v *Najjar*,[6] Lord Denning MR said at p 152:

> We have repeatedly said in this court that a bill of exchange or promissory note is to be treated as cash. It is to be honoured unless there is some good reason to the contrary, eg if there is an arguable case based on total failure of consideration.

I find that there is no total failure of consideration in the instant case. The goods were supplied to and received by the first defendants' customer in Taiwan on 29 July 1989. It was only on 26 August 1989, about a month thereafter, that the first defendants complained to the plaintiffs about a few leaking cans. Subsequently the first defendants also informed the plaintiffs that they intended to have the contents checked. The first defendants' complaint at that time had been that the contents of the fruit drink were too sour and did not comply with the specifications laid down by the first defendants. These facts can be found in para 4 of the affidavit of Tan Meng Choo filed on 21 September 1990 and the exh 'JL-3' to the affidavit of James Loke filed on 6 September 1990.

Section 35(1) of the Sale of Goods Act 1979 provides that 'the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them'. I find that the first defendants had not rejected the goods within a reasonable time. The first time that the plaintiffs received a notice from the first defendants that the canned drinks in Taiwan were damaged and leaking was on 26 August 1989, ie when Tan Meng Choo complained about a few leaking cans.

The first defendants have raised a counterclaim against the plaintiffs. The plaintiffs' claim against the first defendants is based on the DBS cheque no 390463 which was drawn by the first defendants in favour of the plaintiffs, whereas the first defendants' purported counterclaim is based on the underlying contract between the plaintiffs and the first defendants to produce and ship 10,500 cartons of the kiwi fruit juice drinks. The counterclaim does not relate to the plaintiffs' claim but is a separate action altogether. Therefore, the facts alleged by the first defendants are wholly irrelevant to the issue before the court. Even if the first defendants can succeed on their counterclaim, in an application for summary judgment against a defendant on the proceeds of a dishonoured cheque, the defendant will not be allowed to set up by way of a set-off a counterclaim for damages for breach of the underlying contract and the plaintiff is entitled to judgment for the amount of his claim without a stay of execution. A cross-claim relating to the transaction in which the action on a bill of exchange arose is not a defence to the action on the bill of exchange: see *Montecchi* v *Shimco*[7] and *Montebianco Industrie Tessili SPA* v *Carlyle Mills (London) Ltd.*[8]

For the reasons stated above, I am of the view that the first defendants' appeal against the learned assistant registrar's decision to dismiss the application to set aside the judgment entered in default ought to be dismissed with liberty to the first defendants to pursue any claim for alleged loss and damages in separate proceedings.

I now deal with the appeal to set aside the summary judgment against the second defendant. Counsel for the defendants urged this court to set aside the summary judgment against the second defendant on two grounds. The first ground is that the contract made between the plaintiffs and the second defendant is a guarantee for the payment due from the first defendants to the plaintiffs for the goods manufactured and supplied to the first defendants' customer in Taiwan. Under the Bills of Exchange Act (Cap 23, 1985 Ed), a cheque must be supported by consideration: s 27. The first defendants' cheque was post-dated and it was a part payment for goods supplied to the first defendants. When the cans of the kiwi fruit drink were delivered to the first defendants' sub-purchaser in Taiwan, they were found to be unmerchantable and unfit for the purpose. Therefore, counsel contended that the first defendants were entitled to stop payment of their post-dated cheque because there is a breach of contract by the plaintiffs and there is failure of consideration for the contract between the first defendants and the plaintiffs.

Counsel for the second defendant submitted that where a person guarantees payment of a sum due from the debtor under an entire contract and the creditor cannot sue the debtor because there has been no complete performance, the surety is also not liable: see Vol 2 *Chitty on Contracts* (26th Ed) para 5049.

The plaintiffs' claim against the second defendant is based on the contract of 17 July 1989, the terms of which have been set out above. This court finds that under the terms of the said contract, the second defendant promised that she will pay the plaintiffs the sum of $54,500 if the cheque issued by the defendants is not honoured. In consideration for this promise, the plaintiffs released the goods to the first defendants and accepted a post-dated cheque from the first defendants for the sum of $54,500 being payment for moneys due and owing to the plaintiffs for the goods. The plaintiffs duly presented the said cheque for payment but it was dishonoured on 22 August 1989. There was no rejection of the goods by the first defendants prior to the dishonour of the cheque on 22 August 1989. On the basis of these findings, I am therefore of the view that the second defendant must honour the promise she gave under the contract of 17 July 1989. Accordingly, the second defendant's appeal against the summary judgment of the learned assistant registrar is dismissed.

Accordingly, I also award the plaintiffs the costs of the first and third appeals fixed at $2,000 and $800 respectively.

Appeals dismissed.

Solicitors: *Allen & Gledhill; Ang, Netto, Rama & Wilson.*

Reported by *Yap Shao Sin*

Tan Kay Thye & Ors v Commissioner of Stamp Duties

HIGH COURT (SINGAPORE) — ORIGINATING MOTION NO 61 OF 1986
CHAN SEK KEONG J
11 FEBRUARY 1991

Revenue Law — Stamp duties — Assessment — Deed of assent to beneficiary and equality payment benefit — Substantial stampable as partition, conveyance on sale, voluntary disposition or exchange — Stamp Duties Act (Cap 312, 1985 Ed), ss 6, 16, 37 & 40, arts 16, 24, 26 & 34 First Schedule

Words and Phrases — 'Co-owner' — Stamp Duties Act (Cap 312, 1985 Ed), s 2

Words and Phrases — 'Divide' — Stamp Duties Act (Cap 312, 1985 Ed), s 2

Words and Phrases — 'Exchange' — Stamp Duties Act (Cap 312, 1985 Ed), First Schedule art 24

Words and Phrases — 'Severalty' — Stamp Duties Act (Cap 312, 1985 Ed), s 2

Words and Phrases — 'Share' — Stamp Duties Act (Cap 312, 1985 Ed),

Words and Phrases — 'Substantial benefit' — Stamp Duties Act (Cap 312, 1985 Ed), s 16(3)

This was an appeal against the assessment of the Commissioner of Stamp Duties ('CSD') by way of case stated. The deceased, TCB, died intestate possessed of, among other assets, one house in Pasir Panjang which was the residence of his first wife and her seven children, and one house in St Martin's Drive which was the residence of his secondary wife and her three daughters. As the beneficiaries were desirous of retaining their respective residence, by a family arrangement entered into on 11 August 1981, it was agreed that the house at Pasir Panjang be conveyed by way of assent, to the deceased's seven children by his first wife (the appellants), as tenants in common, and the house at St Martin's Drive be conveyed by way of assent to the deceased's secondary wife (second party) solely, subject to her paying to the appellants the sum of $137,133.32 by way of equality of distribution (equality payment). This equality payment was based on the valuation of the house at Pasir Panjang and St Martin's Drive at $1.45m and $1.056m respectively as on 11 February 1980. The appellants conceded that the effective date of the agreement to distribute the residuary estate of the deceased was 11 August 1981 and not 11 February 1980.